01-6978

FOR ARGUMENT

No. 01-69787

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

GARY ALBERT, EWING,

Petitioner-Appellee,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent-Appellant

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

BRIEF ON THE MERITS OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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QUESTIONS PRESENTED

1. Whether California's Three Strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a recidivist defendant whose criminal history includes four violent or serious prior felony convictions, and whose final strike conviction is for felonious grand theft?

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Supreme Court Rules

Rule 37.6 1

IDENTITY AND INTEREST OF AMICUS CURIAE

The California District Attorneys Association (CDAA) has **more than 2,400 prosecutors** in its membership. We present this amicus brief, pursuant to Supreme Court Rule 37, in support of Petitioners.[1] The elected District Attorneys of San Bernardino and Contra Costa Counties submit this amicus brief as the attorneys authorized to represent CDAA. We also have obtained and filed the parties' written consent to this brief.

CDAA has a strong interest in preserving California's **right to sentence recidivist offenders** in the manner which the California State Legislature and the California electorate have deemed appropriate. CDAA seeks to ensure that California retains its right to develop an **independent penological scheme**. As representatives of California's citizens, CDAA also has **a compelling interest** in guarding **against the erosion of the basic tenets of federalism**.

Finally, because CDAA is comprised of officers sworn by oath to protect the people of California from criminals, especially from incorrigible recidivists, we write in hopes that Gary Albert Ewing will be made to serve his *entire* sentence.

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[1] Pursuant to Rule 37.6, CDAA discloses that the Attorney General's Office copied and bound CDAA's amicus brief.

SUMMARY OF ARGUMENT

Appellant Gary Albert Ewing and *amicus curiae* in his support, Families Against Mandatory Minimums (FAMM), overemphasize the weight to be given the nature of the present offense in the threshold comparison of offender and sentence. They take their cues from footnote 21 in *Solem v. Helm*, 463 U.S. 277, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983), which emphasizes the present crime to the detriment of the merely "relevant" criminal history. We believe that that formula was incorrect *then*, but has since been critically modified such that ***today* a recidivist's history weighs at least as much or more as his present crime**.

When Ewing's criminal history is given its proper weight during the threshold comparison, there can be no inference of gross disproportionality. Intrajurisdictional and interjurisdictional analyses are rendered unhelpful and unnecessary, and thus there is no Eighth Amendment violation. (Hence we present no comparative analysis in this brief. Besides, we suppose such comparison will have been already thoroughly briefed by the parties.)

We ask this Court: (1) to assign recidivist criminal history its proper weight in the threshold comparison of Eighth Amendment proportionality analysis, (2) to hold that because of Ewing's long and violent past that there is no inference of gross disproportionality of his sentence to his crime, and therefore, (3) to determine that appellant Ewing's sentence did not constitute cruel and unusual punishment.

I.
THERE IS NO INFERENCE OF GROSS DISPROPORTIONALITY. THEREFORE NEITHER INTRA- NOR INTERJURISDICTIONAL ANALYSIS IS REQUIRED.

Appellant Gary Albert Ewing has been busy committing crimes and sullying his adult criminal record since at least 1984, before six members of this Court joined it. **Sixteen years of crimes** have brought Ewing within the ambit of California's Three Strikes law, yet he has the temerity to insist that this Court focus primarily on his present crime.

Ewing's threshold comparison of the gravity of his crime to the severity of his sentence is flawed. He overemphasizes the nature of his present grand theft offense at the expense of his rotten criminal history. This myopia may not be entirely Ewing's fault. *Solem v. Helm*, 463 U.S. 277, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983), upon which he heavily relies, led the way. But *Harmelin v. Michigan*, 501 U.S. 957, 115 L.Ed.2d 836, 111 S.Ct. 2680 (1991) changed the analysis. ***Today*, in the post-*Harmelin* world, an offender's recidivist history can properly weigh *as much or more* than the nature of his present offense or the severity of the corresponding sentence**.

When Ewing's history is given its proper weight in the threshold comparison, there can be no reasonable inference of gross disproportionality. Mr. Ewing now reaps no more than that which he has long been sowing.

A.

THE PRESENT OFFENSE AND THE SEVERITY OF THE SENTENCE ARE ONLY ONE *PART* OF THE THRESHOLD EQUATION. *CRIMINAL HISTORY* IS NO LESS IMPORTANT A FACTOR.

In *Solem v. Helm, supra*, 463 U.S. 277, a majority of the Court embraced the principle that the Eighth Amendment's ban of cruel and unusual punishments required that prison sentences for terms of years be proportional to their corresponding offenses. "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290.

The *Solem* Court's formula for proportionality review of prison sentences first "look[s] to the gravity of the offense and the harshness of the penalty." *Id.* at 290-291. Second, it "compare[s] the sentences imposed on other criminals in the same jurisdiction." *Id.* at 291. Third, it "compare[s] the sentences imposed for commission of the same crime in other jurisdictions." *Id.*

Conspicuously absent from the *express portion* of three-part *Solem* formula is recidivist history. We think it should have been given a more prominent part in the equation, especially since *Solem* was a recidivist case. If the Eighth Amendment still permits more severe punishment of recidivists, then an offender's criminal history logically belongs ***within*** the first *Solem* prong, the comparison of the gravity of the offense to the sentence. That is not to say that the Court failed to take Helm's recidivism into account; it at least purported to do so. But it gave it very short shrift, and did so expressly. After characterizing

Helm's present felony as "passive" and relatively minor, the Court gave genuflected to the importance of recidivist history:

> Helm, of course, was not charged with simply uttering a "no account" check, but also with being a habitual offender. [n21] And a state is justified in punishing a recidivist more severely than it punishes a first offender. . .

Id. at 296, emphasis added. Nevertheless, the Court casually slipped into footnote 21 this key to its threshold analysis:

> **We must focus on the principal felony** — the felony that triggers the life sentence — since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

Id., emphasis added.

Where did this rule come from? How long has it existed? Where are the authorities upon which it rests? No cases are cited; no authority is given. Yet this "focus on the principal felony" myopically skews the entire proportionality formula.[2] Surely this

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[2] Such a focus also contradicts the holdings in *Rummel v. Estelle*, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980) and *Hutto v. Davis*, 454 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct. 703 (1982), which thought that the present crime should **not** be overemphasized:

> Such analysis was implicitly rejected by **our**

explains much of why Mr. Helm dodged *his* life sentence, while Mr. Rummel was unable to dodge *his*.

If footnote 21 is a correct statement of the law, that even a *recidivist* record is merely "relevant" to *recidivist* sentencing decisions, then forests of convictions must go lightly regarded as sentencing courts stare only at the particular felonious tree before them. It comes as no surprise, then, that such overemphasis of present "minor" felonies should lead to inferences of gross disproportionality. This is precisely what happened in *Andrade v. Attorney General of California* 270 F.3d 743 (9th Cir. 2001) (cert. granted April 1, 2002, 2002 U.S. LEXIS 2158), where that court expressly embraced *Solem's* footnote 21. *Id.* at 759. But, like Bugs Bunny's wrong turn at Albuquerque, the *Solem* Court's "focus on the principal felony" predetermines the destination.

But we cannot believe that the Eighth Amendment to the United States Constitution makes the tip of an offender's iceberg of more concern than the ominous mass lurking below.

We suggest that *Solem* proportionality analysis was critically modified by *Harmelin v. Michigan, supra,* 501 U.S. 957 (1991), so that **recidivist history**

(..continued)

> **conclusion in *Rummel* that the " 'small' amount of money taken" was *inapposite*,** because to acknowledge that the State could have given Rummel a life sentence for stealing *some* amount of money "is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts."

Hutto v. Davis, supra, at 373, emphasis added.

counts for *more* during the threshold comparison of offense and sentence. While it is true that *Harmelin* was not a recidivist case, it appears to have modified *Solem* nonetheless. According to the Fifth Circuit Court of Appeal in *McGruder v. Puckett* 954 F.2d 313 (5th Cir. 1992), cert. denied 506 U.S 849 (1992), a *Harmelin* "head-count" makes this apparent.

In the *Harmelin* decision, Justice Scalia and Chief Justice Rehnquist thought the Eighth Amendment included no proportionality requirement for terms-of-years sentences. *Harmelin, supra,* at 965. Justices White, Blackmun, Stevens and Marshall, dissenting from the judgment, continued to think that *Solem* properly set forth the law on proportionality. *Id.* at 1018, 1027-1028.

But Justices Kennedy, O'Connor and Souter discerned instead that the Eighth Amendment included only a "***narrow*** proportionality principle." *Id* at 997, (Kennedy, J., concurring in judgment), emphasis added. While the three justices agreed that this *narrow* proportionality principle applies to prison sentences for terms of years, they also taught that:

> The Eighth Amendment **does not require strict proportionality** between crime and sentence. Rather, **it forbids only extreme sentences that are "grossly disproportionate" to the crime**.

Id. at 1001, emphasis added.

This means that the second and third *Solem* factors,

> intrajurisdictional and interjurisdictional analyses are appropriate ***only* in the *rare* case** in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

Id. at 1005, emphasis added.

The *Harmelin* split means that only four justices—a minority—continued to support the *mandatory* application of all three *Solem* factors. A majority did not. This can only mean that *Solem*, ***as understood*** by Justice White's group, is either dead or has been "eviscerated." [3]

We think that *Harmelin* changed more than the triggering mechanism for comparative analyses of the second and third *Solem* factors. **It also appears that in the post-*Harmelin* world, recidivism has assumed its rightful place in the first *Solem* factor**, the threshold comparison of offense to sentence.

In *McGruder v. Puckett* 954 F.2d 313, *supra*, petitioner McGruder had been convicted in Mississippi for auto burglary for stealing 20 cases of beer from a truck. *Id.* at 314. He was sentenced to life without possibility of parole under that state's habitual offender statute. He unsuccessfully appealed the denial of his federal petition for writ of habeas corpus, challenging his sentence as cruel and unusual on a theory of disproportionality under the Eighth Amendment.

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[3] Of course Justice Kennedy's group disagreed with that assessment, contending that that *their* understanding of *Solem* was proper, in light of *Rummel v. Estelle*, *supra*, 445 U.S. 263 (1980) and other precedent. *Harmelin* at 996-997, 1005.

After analyzing what *Harmelin* did to *Solem*, the *McGruder* court observed:

> **We think that [petitioner's disproportionality] argument ignores the essence of the statute under which he was sentenced**. Upon his conviction for auto burglary, he was sentenced under the habitual offender statute. Under that statute, his sentence is imposed to reflect the seriousness of his most recent offense, **not as it stands alone, but in the light of his prior offenses**. [Citation and footnote omitted.] We therefore review his sentence.

Id. at 316, emphasis added. The court then "turn[ed] to consider the gravity of McGruder's **offenses** in relation to the harshness of his sentence." *Id.*, emphasis added. In other words, the court considered the petitioner's **entire recidivist record** in its threshold *Solem* comparison—or now more accurately, *Harmelin* comparison. McGruder's previous crimes were not merely "relevant," to the analysis as *Solem* suggested in its footnote 21, but were now an essential and weighty part of the analysis.

McGruder's history included convictions for armed robbery, burglary, larceny, and escape. The court noted that two of the convictions were for crimes of violence *per se*. *Id.* at 314, 316. Predictably, the court held that as a matter of law there was no disproportionality at all, "much less *gross*[ ] disproportionality." *Id.* at 317, emphasis in original.

Importantly, the *McGruder* court engaged in **no comparative analysis whatsoever**. Perhaps more importantly, **the petitioner's present offense was *not* described by the court as serious, or violent**, or christened with some other magic label sufficient to avoid comparative intrajurisdictional and interjurisdictional analyses. In fact, the court said of the present auto burglary that it was a "concededly ***lesser offense*** than the earlier offenses." *Id.* at 317., emphasis added. Starkly contrary to *Solem's* footnote 21, the *McGruder* court actually **gave *greater* emphasis to McGruder's criminal history than it did his present offense**.

In *U.S. v. Brant*, 62 F.3d 367 (11th Cir. 1995), the Eleventh Circuit followed *McGruder's* reasoning in upholding against a cruel-and-unusual challenge a 15.66 year prison sentence for manufacturing marijuana where the defendant had prior state court convictions for growing marijuana with intent to distribute, selling marijuana, armed robbery, and escape. *Id.* at 367. The court considered Brant's criminal history along with the severity of the present offense when it rejected the need to engage in comparative analysis. *Id.* at 368.

The *McGruder* approach makes sense because it was a *recidivist* at bar, and it was his *recidivism* that got him there. Asserting that the present offense must be given more weight, while the recidivism remains merely "relevant" is nothing more than a means to divert attention from a rotten record.[4]

[4] Giving more weight to the present felony *in a recidivist case* than to the recidivist's record is also a tactic supported by many academics and some jurists as an ideological fig leaf, one too small to cover their visceral and subjective opposition to incapacitation as a penal philosophy.

California has not punished or incapacitated Ewing for stealing three golf clubs. We have done so for stealing them ***while having his criminal history.*** Ewing's prior convictions have made him a different, more guilty soul. As Justice Sneed explained about Andrade:

> While petty theft offenses are admittedly not grave, **Appellant's recidivist nature makes his current activity *much more* serious**.[5]

Andrade v. Attorney General, supra, 270 F.3d 743, at 771, emphasis added. (Sneed, J., dissenting.).

Thus there is grand theft—*and*—"much more serious grand theft." A spectrum of guilt necessarily must span the range between the two. Given a particular value of stolen property, the variable that *alone* accounts for that spectrum is criminal history. In other words, there is nothing meaningful *but* the criminal record to distinguish between the gravity of one offender's theft crime and another's. This principle is manifest in those, like Ewing, who sin so many times that they acquire "recidivist natures." These are the predators amongst us who have become predictably felonious—**and progressively more guilty with each new crime**, regardless of each crime's gravity in the abstract.

Logically, then, *a recidivist offender's*

[5] This is the startlingly simple rebuttal to *Brown v. Mayle's* insistence that "a general lawbreaking tendency" cannot constitutionally "justify Three Strikes' mandatory indeterminate life sentence for petty theft." 283 F.3d 1019, 1036 (9th Cir. 2002). Of *course* we do not punish "tendencies," but guilty *people*, and it is clear that some are guiltier than others, even for the same crime.

criminal record in *recidivist cases* goes way beyond "relevant" and ought to be the *paramount* consideration.

And where recidivist records are properly considered in California third strike cases, **the need for comparative analysis should be rare indeed**, because "third strikers" by definition will have committed at least two felonies from either the "serious" or "violent" felony lists, or both. (Cal. Pen. Code §667(b) through (i), and §1170.12.)[6] While it has been held that "no penalty is *per se* constitutional," (*Solem v. Helm, supra*, at 290), one sentenced to 25-years-to-life as Ewing was, will ***always*** have a worse criminal record than Rummel, (whose three minor crimes got him a life sentence) and Helm, *and*, arguably, Harmelin as well.) And parole is no distinction; Ewing *has* the possibility of parole as did Rummel.[7] True, Ewing has to wait twice as long, but his record is at least twice as bad. (*See discussion*, Section B, *infra*.) Besides, even *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002) acknowledged that "differences in age on release" cannot be "determinative." Eighth Amendment analysis "tak[es] into account ***only* those personal circumstances that may mitigate one's *culpability*** in committing the crime." [Citation.] *Id.* at 1028, emphasis added. Parole, obviously, has nothing to do with culpability.

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[6] "Serious" is in quotes for a reason. "Serious felony" is a term of art, meaning that a crime so deemed is listed in California Penal Code §1192.7(c). "Violent felony" is also a term of art, meaning that crimes so deemed are listed in California Penal Code §667.5(c). Many crimes are on both lists. "Violent felonies" all involve violence in the abstract. Almost all "serious felonies" do as well, although a few do not necessarily. That a crime is a "serious felony" does not preclude its being a "violent felony" or a *crime of violence*.

[7] The dissent in *Rummel* argued *against* considering the *possibility* of parole in proportionality analysis. *Rummel v. Estelle*, *supra*, at 294. Yet that same group plus one (Blackmun, J.), the *Solem* majority, thought it was perfectly proper to consider the *unlikelihood* of parole as a factor. *Solem v. Helm*, *supra*, at 297, 300-303. Given this inconsistency, the cynic might think that likelihood-of-parole is a factor to be marshaled only in the direction that might spring the prisoner. But this is digression because parole for Ewing is *not* foreclosed.

The need for comparative analysis was also rejected in *Hutto v. Weber*, 275 F.3d 682 (8th Cir. 2001), where the court upheld consecutive state prison sentences of 60 years for attempted escape plus 25 years for burglary, with possible parole eligibility in the year 2013 (assuming accrual of maximum "good time" credits). The District Court had **considered the facts behind Hutto's prior felony burglary and theft convictions** and determined that his criminal history was "essentially non-violent," and "not as serious as the appellees have attempted to portray it." *Id.* at 684. **The Court of Appeals shared the District Court's concerns** about Hutto's "relatively non-violent criminal history and minor role in the attempted escape. . ." *Id.* at 685. **Even so, following *Harmelin*, the court expressly rejected the need to engage in comparative analysis**, and agreed with the District Court that "Hutto's sentence is not disproportionate to his crime in the constitutional sense." *Id.*

In *U.S. v. Frisby*, 258 F.3d 46 (1st Cir. 2001), the court held that a 151-month repeat-offender sentence for a federal conviction for selling 0.8 grams of heroin was not grossly disproportional. The defendant had submitted comparative sentencing statistics, but the court rejected them, not only because they were inapposite (for failing to compare sentences for repeat offenders with the same from

other jurisdictions), but because there simply was no inference of gross disproportionality from the threshold comparison. This was because:

> Frisby was sentenced **as a career offender**, not simply as a drug dealer. **His sentence reflects a judgment not only about the severity of his controlled substance offenses, but also about the danger of his persistent recidivism**.

Id. at 50, emphasis added. Likewise, our Three Strikes law "reflects a judgment" about the danger of Ewing's persistent recidivism.[8]

And the Fourth Circuit Court of Appeals has gone so far as to hold "repeatedly" that "outside the context of a capital sentence **a proportionality review is necessary *only* with respect to sentences of life imprisonment without the possibility of parole**." *Beverati. v. Smith*, 120 F.3d 500, 504-505 (4th Cir. 1997), emphasis added, citing *U.S. v. Kratsas* 45 F.3d 63, 67 (4th Cir. 1995).[9] Other courts have held likewise. (*See, e.g., United States v. Organek*, 65 F.3d 60, 63 (6th Cir. 1995) ["This Court 'will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole.' "]; and *United States v. Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990) ["However, because Meirovitz was sentenced to life without parole, we will engage in the rare review of the constitutionality of a district court sentence."]

But these post-*Harmelin* cases really present no *new* justification for the principle that a recidivist's record is *not subordinate* to the nature of the present offense. This had been understood, apparently, for two hundred years, and official doctrine for at least 90:

> The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct ***aggravates their guilt*** and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804. . .

Graham v. West Virginia, 224 U.S. 616, 623 (1912), emphasis added. So, it is not the "general criminal tendency," *per se*, but the *aggravated guilt* that dooms

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[8] California's judgment regarding recidivism was made resoundingly clear when its legislature overwhelmingly passed the Three Strikes statute and then again when Three Strikes initiative was embraced by more than 71% of the electorate on November 8, 1994. *People v. Ingram*, 40 Cal.App.4th 1397, 1416, 48 Cal.Rptr.2d 256 (1995). This law embraced the penal philosophies of greater retribution and incapacitation for our most persistent criminals (*id.* at 1415), and reflected the social values of Californians. *People v. Ayon*, 46 Cal.App.4th 385, 400, 53 Cal.Rptr.2d 853 (1996). Hence, the Court's deference to legislative authority "should be at its apex." *Andrade v. Attorney General, supra*, at 768 (Sneed, J., concurring and dissenting.)

[9] Ironically, it was the Fourth Circuit which the dissent in *Rummel v. Estelle, supra*, 445 U.S. 263 recognized as providing

(..continued)

vanguard authority for the idea that the Eighth Amendment proscribed the disproportionality of prison sentences for terms-of-years. *See id.* at 305, dst. opn. Powell, J.

the habitual offender. Unfortunately, this simple—and constitutional—justification was lost in *Andrade* and especially *Brown*.[10]

But California has long understood this and has for decades examined offender history as a critical component of the threshold comparison in cruel and unusual analysis. In *People v. Cline*, 60 Cal.App.4th 1327, 71 Cal.Rptr.2d 41 (1998), for example, where 25-to-life under Three Strikes was imposed upon conviction for grand theft and commercial burglary, the court said it "(1) examines the "nature of the offense **and/or the offender**, **with *particular* regard to the degree of danger *both* present to society** . . ." *Id.* at 1337, citing *In re Lynch* , 8 Cal. 3d 410, 425 [105 Cal. Rptr. 217, 503 P.2d 921 (1972)], emphasis added. Only after this threshold comparison do California courts perform any comparative analysis. Under this formula, it becomes difficult for those in Ewing's shoes to conjure up *any* inference of gross disproportionality.

Respectfully, *amicus* asks this Court to rule that in habitual offender cases such as this, the offender's criminal history may be as important or more so in the threshold comparison of proportionality analysis.

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[10] The *Brown* court even thought that violent prior convictions were *completely irrelevant* to the Eighth Amendment threshold comparison where the present crime is nonviolent. *Brown v. Mayle*, *supra*, 283 F.3d at 1035. ["[t]he presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is nonviolent."] We think that this is an extreme view reflecting only the subjective disagreement of certain appellate justices with the penal philosophies implemented by the people of California.

B.
EWING'S RECORD.[11]

On March 12, 2000, Appellant Gary Albert Ewing walked into a golf pro shop and shoplifted three golf clubs worth $1,200. (*People v. Ewing*, No. B143745, slip op. at 2 (Cal. Ct. App. April 25, 2001.) He was observed by a witness, arrested by police, and charged as a "Three-Striker" with felonious grand theft[12] and second degree ("commercial") burglary.[13]

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[11] Appellant's status, like Helm's, "cannot be considered in the abstract" (*Solem v. Helm*, *supra*, 463 U.S. at 296, footnote 21), but the offender's record must be examined (as was Helm's), presumably *even when* it might *doom* a prisoner rather than spring him. In preparation for the present sentencing hearing, the court read "the prior [court] file", pertaining to the case where Ewing sustained his four strike convictions. (Los Angeles County Superior Court Case No. NA018343.) (See the court reporter's transcript of Ewing's sentencing hearing dated August 3, 2000. ["RT" hereafter.]). It is obvious that the present sentencing court derived from that file underlying factual information about the four strike crimes. (See RT p. 1505 [**court says it read the prior file**; and RT p. 1504 [court's discussion of specific facts, and defense counsel's discussion of Ewing's use of a knife as a weapon during two prior strike crimes].) The document in that file most likely containing renditions of facts would be the preliminary hearing transcript for the preliminary hearing held December 23, 1993. This is because trial transcripts are not normally kept in the trial court file, but preliminary transcripts are. Also, as some proof that the sentencing court relied on that 1993 preliminary hearing transcript, the court's specific comments regarding the female burglary victim who woke up to find Ewing in her home appear to have been derived from it. (Compare RT, p. 1504 with pp. 26-27 of the 1993 preliminary hearing transcript.) We therefore derive much of *our* factual understanding of Ewing's four strikes from the pertinent preliminary hearing transcript. We also understand that this transcript will have been lodged with the Court by the Attorney General.

[12] In California, theft is classified as "grand theft" when the value of the "money, labor, or real or personal property taken"

The jury found him guilty on the grand theft count, but acquitted him of the commercial burglary. On July 18, 2000, the trial court found true special allegations making Ewing a Three Strike offender punishable by 25-years-to-life in state prison. On August 3, 2000, the trial court imposed that sentence.

Ewing was approximately **38 years old** at the time of the present offense,[14] as well as at his subsequent trial, conviction, and sentencing. **Ewing has been on probation, parole, or incarcerated almost continuously since at least 1984**, when Ronald Reagan had yet to embark on his second presidential term.

(..continued)

exceeds $400. California Penal Code §487(a). Qualifying conduct may be charged either as a felony or as a misdemeanor. See Penal Code §489(b) [providing for punishment "in a county jail not exceeding one year or in the state prison"], and see Penal Code §17(a) [designating crimes punishable in the state prison as felonies.] Of course, it falls to prosecutors whether to charge theft as grand (whether as a misdemeanor or a felony) or petty (always a misdemeanor unless there is a prior theft conviction). *See* California Government Code § 26500-26502; *and see People v. Ulibarri*, 232 Cal.App.2d 51, 55; 42 Cal.Rptr. 409 (1965) [disapproved on other grounds in *People v. Williams* 63 Cal.2d 452, 460, 47 Cal.Rptr. 7, 406 P.2d 647(1965)].

[13] "Every person who enters any . . . store . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary. . ." Penal Code §459. Entering a store with intent to steal is second degree burglary punishable by one year in county jail (the maximum allowable for a misdemeanor), or by 16 months, or two years or three years in the state prison. Penal Code §460(b) and §461.

[14] *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) held that "age is a relevant factor to consider in proportionality analysis. This is so because the ***first prong*** of the *Solem* test allows for courts to consider ***multiple factors*** relevant to ***culpability***... (*Id.* at 1284, emphasis added.) Surely 38 is old enough to know better, especially for a parolee as seasoned as Ewing.

A careful reading of the record reveals that Ewing was convicted of at least **13 crimes**[15] *before* committing his present final strike offense, including *at least* **five felonies**,[16] with **the remainder being misdemeanors**.

In November of 1984, Ewing committed grand theft in Ohio and sustained a conviction. The rest of his convictions of which we are aware occurred in California.

In November of 1988, Ewing was convicted of grand theft for stealing a car and was sentenced to three years probation with one year in Los Angeles County jail.

In September of 1990, Ewing was convicted for petty theft with a prior (Cal. Pen. Code §666), and was sentenced to three years probation—again—and ordered to spend 60 days in county jail.

In August of 1992, Ewing was convicted of misdemeanor battery (Cal. Pen. Code §242), and given two years probation and ordered to spend 30 days in county jail.

Also in August of 1992, Ewing was convicted separately convicted of theft—again. (Cal. Pen. Code

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[15] The presentencing probation report lists 10 separate occasions of conviction, but the final one pertains to four separate strike crimes committed on three separate occasions.

[16] In addition to the undisputed number of four strike priors, at least one other crime was a felony. (RT p. 1504:27-28 [defense counsel's comment that appellant had sustained a prior felony theft conviction] and p. 1507:28 [unrebutted comment by prosecutor that appellant had sustained five felonies].)

§484.) He was given a year probation and 10 days in jail.

In January of 1993, Ewing was arrested for burglary (Cal. Pen. Code §459) and obstruction of justice (Cal. Pen. Code §148.9 [false I.D. to peace officers.] He was convicted for violating the latter, given one year probation and 60 days in jail.

In February of 1993, Ewing was convicted for possession of drug paraphernalia (California Health and Safety Code §11364), granted three years probation and ordered to serve six months in county jail.

In September 1993, Ewing was convicted for appropriating lost property (Cal. Pen. Code §485) after having been charged with petty theft with a prior. (Cal. Pen. Code §666.) He received two years probation and 10 days in jail.

Also in September of 1993, in a separate case, Ewing was convicted of carrying a concealed firearm. (Cal. Pen. Code §12020(a).) This conviction looks suspiciously like armed burglary because it was charged with criminal trespass. (Cal. Pen. Code §602.5.) At any rate, it was a misdemeanor and he got one year probation and one month in county jail.

In late 1993, Ewing distinguished himself from Helm by becoming a serious and violent felon. On October 22, 1993, he burglarized the apartment of LaFaye Maddox, at night and while she was home in bed. She awoke to find Ewing still there. Ewing took some items of minor value and left his fingerprints on a wine glass. Ewing was convicted of this burglary as Count 4 in the 1993 information

On the afternoon of November 27, 1993, Lloyd Martinez returned home to his apartment to find that it had been burglarized. Keys to Martinez' garage and to the apartment security complex had been stolen. The keys were recovered from Ewing when police arrested him. Ewing was convicted of this burglary as Count 3 in the 1993 information.

Early the following morning, at approximately 3:00 a.m., apartment resident Steve Jordan was doing laundry in the laundry room when entered and accosted Jordan. Ewing told him he had a gun and demanded money. The man saw only a flashlight in Ewing's waist band and tried to shove him away. Ewing stood his ground and instead of going away, produced a knife with a six-inch blade, gained quick compliance by threatening his victim's life, robbed him of money and credit cards, forced the victim to provide access to his apartment, and fled. Ewing was convicted on this residential robbery and burglary as Counts 1 and 2 of the 1993 information.

For these four **violent and serious** crimes, Ewing was sentenced to nine years, eight months in state prison.[17]

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[17] We cannot help but doubt that *certiorari* would have been granted had California sentenced appellant to 25-years-to-life *then*, for *those crimes*. It is only after California law gave appellant a final chance to avoid incapacitation—a *bonus* for him—that our recidivist statute is called into question because it was triggered by felony thievery rather than something else. Is this not motivation for the People of California to eliminate the third strike requirement altogether and affix the 25-to-life sentence to an offender's *second* violent or serious felony strike? Such a sentence would surely be constitutional under *Solem's* present-felony priorities.

Ewing was on parole nine months when he committed his present grand theft of expensive golf clubs. And now he insists that the Eighth Amendment cares more how his present crime looks when set alongside his large sentence, than it does his past crimes. Hogwash.

The present crime is Ewing's sixth felony. We agree with the presentence probation report, which characterized the present crime as "serious," and Ewing as an obvious "threat to the community." There were five factors in aggravation and not a single one in mitigation.

C. ANALYSIS.

The only way to infer gross disproportionality here is to perform the threshold comparison while wearing those special glasses that shrink the present offense, magnify the sentence, and blind one to this offender's persistent and, at times, violent past. But that perspective is not the law.

1. Respondent's Felony Strikes Were Violent and Serious.

Respondent's "felony strikes" consisted of three convictions for first-degree residential burglary and one first-degree residential robbery at knifepoint. It should be undisputed that the robbery and associated burglary of Steve Jordan were both violent in the abstract by any objective standard. Additionally, both crimes were "serious felonies" (Cal. Pen. Code §1192.7(c)(18), and the robbery was a "violent felony." (Cal. Pen. Code §667.5(c)(9).)

Moreover, it is possible that the Jordan burglary and the Maddox burglary were "violent felony" strikes when he committed his present offense, for the simple reason that his victims were present while he burglarized them them. (Cal. Pen. Code §667.5(c)(21) [proscribing as a violent felony any residential burglary where it is charged and proved that the victim is present during the crime], passed by voter initiative Proposition 21, March 7, 2000, which took effect the following day, March 8, 2000.)[18]

This means that of Ewing's four strike crimes, all are "serious felonies," three are arguably "violent felonies," and two were unquestionably violent in the abstract. We think the Maddox burglary is also violent in the abstract. (Imagine the abject terror Ms. Maddox must have felt upon waking in the wee hours to find a strange intruder in her home.) However, even if a residential burglary does not ***actually* involve** violence, it has **great *potential* for violence**.

In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Court recognized that "**burglary is one of 'the most common violent street crimes**," and the character of a burglary "can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is

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[18] March 8, 2000 was also the new "freeze date" for the violent and serious felony strike lists. (California Penal Code §1170.125.) That means that "victim-at-home" burglaries can serve as prior "*violent*" as well as "serious" felony convictions when the third strike felony is committed after March 8, 2000. We cannot be sure here, however, about whether the Jordan and Maddox burglaries qualified, as no court has yet construed the "charged and proved" language in California Penal Code §667.5(c)(21).

still on the premises." 495 U.S. at 581, emphasis added; *see also id.* at 588. California sees residential burglary similarly. *See People v. Davis*, 18 Cal.4th 712, 720, 76 Cal.Rptr.2d 770 (1998) [explaining the gravity of residential burglary and its potential for violence]; *and see People v. Hines*, 210 Cal.App.3d 945, 950-951; 259 Cal.Rptr. 128 (1989) [explaining residential burglary's potential for violence.]

Ewing and *amicus* in his support fail to appreciate the violence of burglary, despite **numerous other statutory cues**. ***First***, there is no **plea-bargaining of "serious felony" charges**.[19] ***Second***, a defendant **may not be released without a hearing** and a finding of "unusual circumstances."[20] ***Third***, a prior conviction of a serious felony constitutes a **mandatory, non-strikeable five-year enhancement** to a current serious felony conviction.[21] ***Fourth***, a prior conviction of a serious felony **constitutes a "felony strike."**[22] ***Finally***, a serious felony conviction **may preclude probation or a suspended sentence** on a new felony conviction,[23] and **may make a defendant ineligible for drug treatment** for a current nonviolent drug possession offense.[24]

Length of sentence does not always tell the entire tale: these restrictions on burglary prosecutions reflect the legislative and electoral determination that the crime of residential burglary is one of the **most serious crimes** against the citizens of this state. To subordinate the consideration of Ewing's violent

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19 Cal. Pen. Code §§1192.7 (a) and (b).
20 Cal. Pen. Code §§1270.1, 1275(c).
21 Cal. Pen. Code §667 (a).
22 Cal. Pen. Code §§667(c), 1170.12(a).
23 Cal. Pen. Code §§1203.085(a)(b), 1203(k).
24 Cal. Pen. Code §1210.1(b)(1).

burglaries and robbery to his principal offense in the threshold comparison would be, in effect, to undermine California's many hard-won protections against burglars, robbers, and recidivists.

2. The Gravity of Ewing's Present Grand Theft Offense Should Not Be Downplayed.

Ewing committed *felony* grand theft. Grand theft has been part of the Cal. Pen. Code since 1872 and before. It is an "alternative felony crime" - one that is chargeable and punishable *either* as a felony or as a misdemeanor.[25]

An alternative felony crime or "wobbler" **charged as a felony remains a felony *unless*** a court imposes a misdemeanor sentence. *In re Anderson*, 69 Cal.2d 613, 664, fn.16, 73 Cal. Rptr. 21, 447 P.2d 117 (1968); *People v. Banks*, 53 Cal.2d 370, 381-382, 1 Cal. Rptr. 669, 348 P.2d 102 (1959); *People v. Bozigian*, 270 Cal.App.2d 373, 379, 75 Cal.Rptr. 876 (1969); *People v. Washington*, 243 Cal.App.2d 681, 687-688, 52 Cal.Rptr. 668 (1966).

A California sentencing court may reduce a "wobbler" to a misdemeanor even when the defendant has suffered prior "felony strike" convictions. *People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 979, 60 Cal.Rptr.2d 93, 928 P.2d 1171 (1997). **If the court does not do so, the crime remains a felony**.

When such a felon has suffered prior convictions within the meaning of California's "Three Strikes" statutes, they must be proven or admitted. After the "felony strikes" have been proven or

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25 Cal. Pen. Code §17.

admitted, the trial judge still may dismiss them.[26] *People v. Superior Court (Romero)*, 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628 (1996). When the defendant has been found guilty of multiple current charges, the court may dismiss "felony strikes" as to one crime and may decline to dismiss them as to another current crime. *People v. Garcia*, 20 Cal.4th 490, 499-500, 85 Cal.Rptr.2d 280, 976 P.2d 831 (1999).

If a court does not dismiss *all* "felony strikes," a defendant's conviction becomes subject to the "Three Strikes" sentencing statutes. The "Three Strikes" statutes supplant the ordinary sentencing scheme for the underlying felonies. *People v. Dotson*, 16 Cal.4th 547, 556, 66 Cal.Rptr.2d 423, 941 P.2d 56 (1997); *People v. Superior Court (Romero)*, *supra*, at 524.

Thus, a defendant who is convicted of a **felony theft offense** and who has suffered at least two "felony strikes" **is not** punished ***simply*** for **felonious theft.** He is punished instead under the Three Strikes sentencing scheme, which mandates harsh punishment ***only*** for those with the qualifying prior convictions. In other words, he is **punished for his recidivism**. *People v. Lawrence*, 24 Cal.4th 219, 226-227 99 Cal.Rptr.2d. 570, (2000).

Ewing's present conviction is for felonious conduct, period. He has long behaved like a felon, has recently stolen property worth a felonious amount, and now he reaps the persistent felon's reward. The sentencing court declined to exercise its discretion to dismiss strikes or to reclassify the present crime as a misdemeanor. That should tell us something.

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[26] Cal. Pen. Code §1385

The seriousness of Ewing's crime is not measured alone by the value of the property he stole—$1,200 in golf clubs. Shoplifting causes annual losses to merchants estimated in the billions of dollars, forcing retail businesses to hire and maintain large security staffs to combat such pestilence, and to raise prices to compensate. In 2000, for example, one source indicates that United States retailers lost $32.3 billion to theft, 1.75% of their total sales, up from $29 billion the year before, which was 1.69% of total sales. Richard C. Hollinger, PhD & Jason L. Davis, 2001 National Retail Security Survey, (University of Florida 2001). Other sources have placed annual shoplifting losses at $7.2 billion. David A. Anderson, The Aggregate Burden of Crime, 42 J. Law & Econ. 611, 638 (Univ. Chi. 1999).

Moreover, shoplifting is a potentially violent crime because shoplifters who are detected frequently attempt to escape. Some escape attempts result in **violent confrontations** when the thieves use force or fear against store personnel or other citizens attempting to apprehend them.

When a thief in California uses force or fear to escape with merchandise taken in a commercial shoplift, **the thief is properly charged with robbery**. *See, e.g., People v. Estes*, 147 Cal.App.3d 23, 194 Cal.Rptr. 909 (1983). These robberies are punishable under Cal. Pen. Code §211 in the manner in which all unarmed robberies are punishable.

Confrontations between shoplifters and those trying to stop them **can escalate to deadly confrontations**. *See, e.g., People v. Weddle*, 1

Cal.App.4th 1190, 1198, fn. 9, 2 Cal.Rptr.2d 714 (1991).

This Court has recognized that a crime presenting **a threat of violence** is more serious than **a clearly nonviolent offense**. *Solem v. Helm, supra*, 463 U.S. 277, 293-294; ["nonviolent crimes are less serious than crimes marked by violence **or the threat of violence.**" [emphasis added]].

CONCLUSION

A careful reading of Ewing's record shows that up through 1993, he was becoming increasingly brazen and more violent with each new crime. We must not forget about his battery and firearm convictions that preceded the violent robbery and three burglaries. Only Ewing's nine years in state prison brought California temporary respite. The property, lives and limbs of potential victims may well have been preserved during that time. But only nine *months* after those nine years *parolee* Ewing again turned to his same old ways.

Ewing robs, threatens, burglarizes and steals with impunity, showing no remorse for these predations. He is predictably felonious because of his recidivist nature. His background is a trail of mud, his character is a patchwork of greed, sloth and obstinacy, and his prospects are an abyss. That Ewing has yet to shed blood moves no reasonable person to sympathy—bloodshed by him is surely a matter of time.

In short, Gary Albert Ewing is a bad man with a bad record. He now seeks to conceal that record to avoid his just sentence. We think success for him

depends almost entirely upon the weight given his recidivist record in the threshold comparison. Only if the Court focuses on Ewing's present felony as *Solem* prescribed, will he have a *chance* to join Helm in dodging a life sentence. But we have shown that *Harmelin* has changed things. A good many, if not most, jurisdictions avoid rushing headlong into comparative intra- and interjurisdictional analysis. They first look for an inference of gross disproportionality of crime to sentence. And contrary to *Solem*, these many courts do *not* overemphasize the principal felony in recidivist cases. They focus on the recidivist's record, sometimes primarily.

Put another way, since an effective criminal justice system must gauge an offender's guilt, cognizance ***must*** be taken of his criminal record. The law and common sense agree that the violent burglar who shoplifts is ***far more guilty*** for shoplifting than the hungry college student who is low on groceries.

When Ewing's record is given its *proper* place in the threshold comparison, **there can be no inference of gross disproportionality**. His record is **worse than Rummel's** in length, number of convictions, and gravity. It is **worse than Helm's** in the same three ways. And it is **worse than Harmelin's** even in gravity because of Ewing's six-inch knife.

Because icebergs run deep, only the foolish focus on their peaks. It is far wiser to worry about the great icy mass *under* the surface because that is where the danger lies. Surely the Eighth Amendment allows such consideration.

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